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TAN SENG HUAT

v.

AFFIN BANK BHD & OTHER APPEALS

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HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS JC
[CIVIL APPEAL NO: 29-2142-2011
& OTHER APPEAL NO]
31 JANUARY 2013

C

BANKRUPTCY: *Receiving and adjudication order - Appeal against - Granting or receiving and adjudication order in absence of judgment debtor - Whether contravened s. 24(1) Bankruptcy Act 1967 - Whether receiving order and adjudication order should have been granted in stages and not*

D

simultaneously - Whether condition under s. 6(2) satisfied before receiving order made

Tan Seng Huat ('the JD') in this case took a housing loan from the respondent, Affin Bank Bhd. Upon default on the repayment

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of the loan, judgment was obtained against him which eventually led to the issuance of a bankruptcy notice and creditor's petition. At the hearing of the creditor's petition, the Senior Assistant Registrar ('SAR') granted a receiving order ('RO') and an adjudication order ('AO') against the JD. Throughout the

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bankruptcy proceedings, the JD had never appeared to protect his own interest. The appellant objected to the granting of the AO on the ground that it contravened s. 24(1) of the Bankruptcy Act 1967 ('the Act') which requires the presence of the debtor before the AO could be made simultaneously. It was the appellant's

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argument that the RO and AO should have been granted in stages and that the court only had power to grant RO only if the conditions stipulated under s. 6(2) of the Act are satisfied.

Held (dismissing appeal):

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(1) In the case of *Re Mat Shah Safuan, Ex p United Asian Bank Bhd* it was held that under s. 6(2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of had been proved to the satisfaction of the court, a receiving order will be made in pursuance to the

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petition. It further held that the provisions of s. 15(1) of the

Act and r. 150(1) of the Bankruptcy Rules 1969 merely set out the procedures to be followed after a receiving order had been made and they are merely the administrative acts of the Official Assignee and had nothing to do with the jurisdiction of the court. (para 25)

(2) The repeated absence on the part of the JD clearly showed that he was evading the whole bankruptcy proceedings initiated by the JC. To accede to the agreement that s. 24(1) of the Act is mandatory to require the presence of the debtor for such a situation will only be to defeat the purpose of the provision of the said section to delay the hearing of the creditor's petition for an indefinite period in order to secure the presence of the debtor. In the very first place, if the debtor was really keen to settle his debt in good faith, he would have responded to the bankruptcy notice or he should have been present at the first date of the hearing of the creditor's petition. (para 23)

[Editor's note: There were 104 cases basically touching on the same issue filed by the Director General of Insolvency Department pending the outcome of this decision from the Court of Appeal. All the parties involved agreed that this case ought to be a test case. The appeal numbers are as follows: 29-1959-2011, 29-556-02/2012, 29-2083-06/2012, 29-1875-06/2012, 29-2084-06/2012, 29-3178-12/2011, 29-3005-12/2011, 29-36-01/2012, 29-1899-2011, 29-3058-12/2011, 29-3110-12/2011, 29-2726-10/2011, 29-2498-10/2011, 29-3138-12/2011, 29-3137-12/2011, 29-2764-11/2011, 29-3186-12/2011, 29-2109-2010, 29-707-03/2012, 29-2425-07/2012, 29-2846-11/2011, 29-692-03/2012, 29-2653-10/2011, 29-1936-2011, 29-2589-10/2011, 29-1935-2011, 29-317-02/2012, 29-96-01/2012, 29-1699-2011, 29-859-2011, 29-1461-2011, 29A-1347-2011, 29-1557-2011, 29-1225-2011, 29-1467-2011, 29-1591-2011, 29-1464-2011, 29-978-2011, 29-1480-2011, 29-758-2011, 29-181-2011, 29-1611-2011, 29-759-2011, 29-2551-2010, 29-757-2011, 29-791-2011, 29-3194-12/2011, 29-221-01/2012, 29-1761-2011, 29-3081-12/2011, 29-76-2010, 29-1602-2011, 29-1939-2011, 29-1422-05/2012, 29-1407-2011, 29-1480-05/2012, 29-754-03/2012, 29-2675-10/2011, 29-2187-09/2011, 29-2192-09/2011, 29-1566-05/2012, 29-1912-2011, 29-1413-05/2012, 29-941-04/2012, 29-2590-10/2011, 29-2853-11/2011, 29-1083-04/2012, 29-806-03/2012, 29-2131-2011, 29-2256-09/2011, 29-691-03/2012, 29-2808-11/2011, 29-3123-12/2011,

29-916-03/2012, 29-2910-11/2011, 29-90-01/2012, 29-1150-04/2012, 29-2708-10/2011, 29-2299-09/2011, 29-2674-10/2011, 29-2186-09/2011, 29-2834-11/2011, 29-152-01/2012, 29-934-03/2012, 29-940-04/2012, 29-666-03/2012, 29-390-02/2012, 29-2687-10/2011, 29-1622-05/2012, 29-628-03/2012, 29-2220-09/2011, 29-58-01/2012, 29-1844-06/2012, 29-3038-12/2011, 29-442-02/2012, 29-2373-09/2011, 29-3132-12/2011, 29-514-02/2012, 29-1981-06/2012, 29-2928-11/2011, 29-35-01/2012, 29-887-03/2012, 29-2493-10/2011*]*

Case(s) referred to:
Affin Bank Bhd v. Tan Sri Kishu Tirathrai [2008] 2 CLJ 448 CA ***(refd)***
Re Mat Shah Safuan, Ex p United Asian Bank Bhd [1990] 1 LNS 115 HC ***(refd)***
Re Sardar Ali [1955] 1 LNS 123 HC ***(dist)***
Re Tan Sri Kishu Tirathrai; Ex p Affin Bank Bhd [2007] 7 Supp 270 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 4, 6(2), 15(1), 24(1), 36, 38
Federal Constitution, arts. 5(1), 8(1)

For the respondent - BK Ong (PL Lim & KK Yeap with her); M/s Gibb & Co
For the Insolvency Departments - Mohd Ishanudin, Penang Insolvency Department

Reported by S Barathi

JUDGMENT

Mohd Amin Firdaus JC:

Background

[1] At the hearing of the creditor's petition on 29 September 2012, the senior assistant registrar ('SAR') granted a receiving order ('RO') against the judgment debtor ('JD') named Tan Seng Huat who was not present. She also made an adjudication order ('AO') against the JD at the same time.

[2] The representative for the Director General of Insolvency for the property of the JD Tan Seng Huat ('appellant') objected to the granting of the AO for the respondent, namely Affin Bank Berhad.

[3] The basic objection was that at the hearing of the creditor's petition, the JD Tan Seng Huat was not present and the granting of the AO contravened the provision of s. 24(1) of the Bankruptcy Act 1967 ('Act 360') which requires the presence of the debtor before the AO could be made simultaneously.

[4] The appellant stated that the court acted under s. 6(2) and s. 4 of Act 360 in making the RO and under s. 24(1) of the same Act in granting the AO.

[5] Section 4 of the Bankruptcy Act 1967 (Act 360) states:

> **Jurisdiction to make receiving order**
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> Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, the Court may on a bankruptcy petition being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order.

[6] Section 6(2) of Act 360 states:

> (2) At the hearing the court shall require proof of:
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> (a) the debt of the petitioning creditor;
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> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and
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> (c) if the debtor does not appear, the service of the petition,
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> and if satisfied with the proof may make a receiving order in pursuance of the petition.

[7] Section 24(1) of Act 360 lays down:

> **Adjudication of bankruptcy**
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> At the time of making a receiving order the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors; provided that when a receiving order is made against a firm in the firm's name the court shall not adjudge any person bankrupt as a member of the firm unless such person is proved to the satisfaction of the court to be a partner by his own admission or by evidence on oath.

A **Appellant's Argument**

[8] The appellant contended that the court should have granted the RO and AO in stages. It was further contended if s. 4 was to be read together with s. 6(2), it means after the conditions as
B stipulated under s. 6(2) have been met, only then the court has the power to grant RO to the respondent.

[9] In a nutshell, the argument is that for the RO to be made by the SAR, the court ought to obtain sufficient evidence of the existing debt, the act of bankruptcy committed by the debtor and
C the completion of service.

[10] All these requirements are mandatory.

[11] It was argued that the presence of the JD is mandatory in
D accordance with s. 24(1) of Act 360.

[12] The appellant contended if the JD is not present, how could the debtor show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement
E satisfactory to his creditors.

[13] The case of *Re Tan Sri Kishu Tirathrai; Ex p Affin Bank Bhd* [2007] 7 CLJ 270; [2007] 2 MLJ 53 (HC) was cited to support the appellants arguments.

F **[14]** The appellant also pointed out that the provision of art. 5(1) enshrined in the Federal Constitution provides for the liberty of the person and that once a person is adjudged a bankrupt as laid down in s. 36 and s. 38 of the Bankruptcy Act 1967, he does not have the liberty like other ordinary citizens.

G **[15]** Article 8(1) of the Federal Constitution provides that all persons are equal before the law and entitled to the equal protection of the law was also referred to by the appellant.

Issues

H **[16]** Whether s. 24(1) of Act 360 provides that the presence of the judgment debtor is mandatory at the hearing of the creditor's petition in order for him to show to the satisfaction of the court that he is in a position to offer a composition or make a scheme
I of arrangement satisfactory to his creditors, then only the court can grant on adjudication order simultaneously with the receiving order?

Findings Of The Court

[17] The court dismissed the appeal of the appellant to set aside the RO and AO granted by the SAR on 26 September 2012 or alternatively to maintain the RO and annul the RO.

[18] In this case briefly the JD Tan Seng Huat borrowed a housing loan from the respondent Affin Bank Bhd and defaulted on the payment of the loan. Judgment was obtained against him and according to the SAR, the sum involved is RM275,308.63 which eventually led to the bankruptcy notice being issued by the judgment creditor. Unsuccessful attempts were made to serve it on the JD at the address given by the judgment creditor.

[19] The judgment creditor then resorted to substituted service in the newspaper.

[20] The judgment creditor encountered the same problem when trying to serve the creditor's petition on the JD until they also had to resort to substituted service.

[21] It is noteworthy to point out that throughout the whole bankruptcy proceeding on five occasions in court, the JD did not even appear once to protect his own interest.

[22] Thus the contention of the appellant that the SAR ought to have waited for the presence of the JD at the hearing to show that he was in a position to offer a composition or make a scheme for arrangement before the making the adjudication order is untenable.

[23] The repeated absence on the part of the JD is crystal clear that he was evading the whole bankruptcy proceeding initiated by the judgment creditor. To accede to the agreement that s. 24(1) is mandatory to require the presence of the debtor for such a situation will only be to defeat the purpose of the provision of the said section to delay the hearing of the creditor's petition for an indefinite period in order to secure the presence of the debtor. It is not practical. The case can drag on indefinitely. It is the view of this court that if the debtor were really keen to settle his debt in good faith with the judgment creditor, in the very first place he would have responded to the bankruptcy notice, if not at the first date of the hearing of the creditor's petition, he should have been present.

[24] As to the argument on the negative effect upon the debtor on being adjudged a bankrupt in society, this aspect of the argument is not within the purview of this court, it is best left to the Legislature.

[25] In the *Re Mat Shah Safuan; Ex p United Asian Bank Bhd* [1990] 1 LNS 115; [1991] 2 MLJ 48 (HC) the learned judge Siti Norma Yaakob (as she then was) stated:

> Coming to the petition itself, the debtor contends that the court is only empowered to make a receiving order pursuant to the prayer contained in the first paragraph of the petition and also pursuant to s. 6(2) of the Act. Consequent upon such an order, a general meeting of creditors will be held under s. 15(1) of the Act for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained and under r. 150(2) once a resolution for the acceptance of the composition or arrangement has been passed by the creditors at the first meeting and before the holding of a subsequent meeting to confirm the resolution, the debtor informs the official assignee in writing that he is unable to carry out the proposed composition or scheme or if at the subsequent meeting the proposed composition or scheme is not confirmed, the official assignee shall apply to the court to adjudicate the debtor a bankrupt and the court may so adjudge him without any further notice to him. In view of the specific provisions in the Act and the rules, the debtor contends that he must be given the chance to submit a proposal for the composition or scheme of arrangement to his creditors before the court is empowered to adjudge him a bankrupt.
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> Under s. 6(2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements have been fulfilled and pursuant to para. 1 of the petition, I am empowered to make a receiving order against the debtor. Under r. 150(1) when a receiving order has been made, any creditor of the official assignee may apply to the court to adjudge the debtor bankrupt. In this case the judgment creditor orally applied to have the debtor adjudged a bankrupt and I had in deference to the debtor's objection adjudged him so as s. 15(1) and r. 150(2) do not prohibit me from making such an adjudication order. These provisions merely set out the procedures to be followed after a receiving order has been made and they are merely the administrative acts of the official assignee and have nothing to do with the jurisdiction of the court to adjudicate a debtor a bankrupt under r. 150(1) on the oral application of the judgment creditor, following the making of a receiving order on him.

[26] Incidentally the case of *Re Tan Sri Kishu Tirathrai* cited by the appellant had been overruled by the Court of Appeal on 17 December 2007 in *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2008] 2 CLJ 448 (CA).

[27] Murray-Aynsley CJ in *Re Sardar Ali* [1955] 1 LNS 123; [1955] 21 MLJ 140 held that: Where there is an application for an adjudication order, the words of s. 24(3) of the old Bankruptcy Ordinance (Cap 45) – similar to the current s. 24(1) – are peremptory; and that in making an adjudication order, the discretion which the court has given itself ought not be extended. That discretion is limited to the granting of an adjournment for further negotiation with a view to a composition. To the understanding of this court, "discretion" only applies when the JD is present.

[28] There are now 104 cases basically touching on the same issue filed by the Director General of Insolvency Department pending the outcome of this decision from the Court of Appeal. All the parties involved agreed that this case ought to be a test case.